KUMARAPPAN KM PALANIAPPAN v. KIRANJIT KAUR JAGJIT SINGH & ORS

HIGH COURT MALAYA, KUALA LUMPUR
MOHD ARIEF EMRAN ARIFIN JC
[WRIT SUMMONS NO: WA-22NCVC-157-03-2016]
16 NOVEMBER 2022

Abstract – *Counsel and solicitors are not mere mouthpieces of their clients. They have a duty not only to their clients but also to the court. Counsel and solicitors are required to exercise professional and independent judgment in determining the arguments and issues to be put to the bench. They must be empowered with the discretion to pick the best arguments possible to enhance the chances of success for their clients. Counsel and solicitors are not required, unless specifically instructed to do so, to put forward all of the arguments that the client wishes. This discretion is not absolute but unless it is shown that the decision is not one that a reasonable advocate and solicitors would have undertaken, then he is not negligent.*

LEGAL PROFESSION: *Negligence – Contractual duty – Breach – Failure of solicitor to act on instructions of client – Solicitors did not pursue all points raised in memorandum of appeal and draft written submissions and decided to withdraw counterclaim – Appeal dismissed – Whether there was specific instruction from client to submit submissions in toto – Whether client aware of course of action and decisions made by solicitors – Whether solicitors negligent and in breach of contractual duty*

CIMB Bank had filed a civil suit against, *inter alia*, the plaintiff seeking to re-instate its charge over a land. In his defence, the plaintiff relied on, *inter alia*, the alleged *locus standi* of CIMB Bank to deny the plaintiff the right to the said property and for an order that the registrar's caveat on the said land be removed and damages for wrongful entry of the private caveat. The original charge was held by Cempaka Finance Bhd but through a series of mergers and acquisitions eventually vested and transferred to CIMB Bank. The said charge was wrongfully removed by a false or fraudulent Form 15N and the land was subsequently transferred to one Abdul Rafi. The land was subsequently sold to the plaintiff. CIMB Bank found that the charge was wrongfully removed and instituted proceedings to re-instate the charge and challenge the title held by Abdul Rafi and the subsequent sale to the plaintiff. CIMB Bank was successful in the civil suit. The plaintiff filed an appeal to the Court of Appeal and appointed the first and second defendants to represent him and act as solicitors for the civil appeal. Prior to that, the plaintiff had engaged the services of one Thayalan as counsel for the civil appeal and he was also assisted by his friend ('Rajentharan'). Rajentharan

A even drafted the memorandum of appeal, the amended memorandum of appeal and a submission to be utilised for the civil appeal. A copy of the submission was forwarded by Rajentharan to the first and second defendants with a note 'Attached herewith is the written submission for submission to Court of Appeal … for your comments and adoption'. The plaintiff, on the
B other hand, also forwarded the same email to the first and second defendants without any instructions. He did not direct in the email that the said submissions must be adopted *in toto* or that all the issues stated in the submissions must be addressed by the first and second defendants or by any counsel acting for the plaintiff. Rajentharan also issued an email to the first
C and second plaintiff, attaching an application to amend the memorandum of appeal, the affidavit in support of the application and the proposed amendment of the memorandum of appeal. The first and second defendants, sought the assistance of the third defendant to act as counsel for the civil appeal on behalf of the plaintiff. The third defendant agreed. The first and
D second defendants forwarded copies of the relevant documents, including but not limited to the record of appeal, the ground of the civil suit judgment and the draft written submissions prepared by Rajentharan for the third defendant to peruse and consider. Eventually, the third defendant agreed to act on behalf of the plaintiff and began to prepare submissions. The submissions prepared by the third defendant was forwarded to the first and second
E defendants. The first defendant forwarded the same to the plaintiff. The civil appeal was heard and was attended by the defendants, acting on behalf of the plaintiff. During the appeal, the defendants, through the third defendant, decided to only pursue the issue of CIMB's right or *locus standi* of CIMB Bank to issue proceedings against the plaintiff instead of the other issues allegedly
F highlighted in the earlier written submissions and all the other issues stated in the draft prepared by Rajentharan. The other issues were abandoned by the defendants and the third defendant withdrew the counterclaim against CIMB Bank and the land office. The Court of Appeal dismissed the appeal. The plaintiff lodged a complaint with the Bar Council and commenced this
G suit against the defendants for their negligence in the conduct of the civil appeal. The plaintiff alleged that the defendants had breached their contractual obligations to him by failing to provide legal services professionally and lacked due care, skill and diligence in the prosecution of the civil appeal and related proceedings thereto. As a result, the plaintiff claimed the following damages against the defendants: (i) loss of value of the
H land which was approximately RM10 million; (ii) costs of the proceedings in the High Court, Court of Appeal and the Federal Court paid to CIMB Bank; (iii) legal fees paid to the defendants; (iv) legal fees at the Court of Appeal; and (v) legal fees for leave to the Federal Court. The damages sought by the plaintiff against the defendants totalled to RM10,415,000. The issues
I that arose were: (i) whether the plaintiff had instructed the defendants to pursue all points raised in his memorandum of appeal, the draft written submissions written by Rajentharan or the written submissions filed by the

third defendant; and (ii) whether the defendants were negligent in the conduct of the civil appeal by (a) withdrawing the counterclaim and the other points raised in the memorandum of appeal; (b) failing to advise on the decision not to continue with the counterclaim and the remaining points of the appeal; and (c) failing to seek surplus proceeds from the sale of the land.

Held (dismissing claim):

(1) There was no documentary evidence that was issued before the hearing of the civil appeal that the plaintiff had recorded his instructions that all the arguments/submissions in the civil appeal must be ventilated before the Court of Appeal. If this was the case, the plaintiff would have surely recorded that either in SMS, email or any letter to the first and second defendants. He was after all a client who took it personally to be involved in the preparation of the case. He would have surely ensured that all such instructions be put in writing and reminded the defendants that all of the arguments must be included in any written submissions or any arguments to be put to the Court of Appeal. The plaintiff had only forwarded the draft of submissions of the civil appeal, affidavits and notice of the application to amend the memorandum of appeal without any specific instructions. The plaintiff did not specifically state that the said submissions must be adopted *in toto* and that the defendants were required to include all the points for consideration at the Court of Appeal. (paras 70, 71 & 74)

(2) The draft written submissions were prepared and attached in the email by the third defendant to the first defendant which was eventually sent to the plaintiff. The submissions clearly showed that the defendants decided not to pursue substantial parts of the arguments that were suggested by Rajentharan. Instead, in the said draft, the third defendant only wanted to pursue the issues of (i) *locus standi* of CIMB Bank; (ii) the alleged non-*bona fides* on the part of the plaintiff; and (iii) the alleged failure of the trial judge in the civil suit to consider the evidence before the court. The plaintiff did receive the said submissions. The email from the first defendant was sent to his Gmail account and he eventually sent the same to Rajentharan. The evidence indicated that it was more likely than not that the plaintiff had left the issues to be argued to be determined by the third defendant and he did not give any specific instructions. If he was so unhappy with the situation at that time, he would have surely recorded this issue in an email or SMS with the defendants. This was not done. (paras 76, 77, 79, 82 & 84)

(3) The plaintiff was present at the hearing of the civil appeal and he was aware that the third defendant then chose to only restrict his argument solely on the issue of *locus standi* of CIMB Bank. However, the plaintiff chose to keep quiet during the civil appeal and did not call on the defendants to stop their course of action. (paras 86 & 88)

(4) The solicitors and counsel were only engaged at the appeal stage. This was not a case where the solicitors and counsel had taken the brief from the outset. By the time the file came to their laps, the High Court had found their client's title to the land not indefeasible as he had failed to prove that he was a *bona fide* purchaser of value protected under s. 340(3) of the National Land Code. It was reasonable for an advocate and solicitor, especially when dealing with an appeal from a decision of the court of first instance, to decide on the merits of the arguments and concentrate solely on the issues of law instead of facts. Issues of facts, as found by the lower courts, are generally not interfered with by the appellate courts. Merely because a counsel or a solicitor chose not to argue issues or points that the client or even another attorney believed to be strong did not mean that the said counsel was negligent. The defendants were not negligent. (paras 99, 107, 109 & 111)

(5) The defendants began work by drafting the submissions to be utilised and the arguments to be put to the Court of Appeal. Due to the timeline presented to the third defendant, he only had a window of less than a month before the appeal and almost less than two weeks to prepare submissions for the hearing of the Court of Appeal. The defendants could not be blamed for not providing any written opinion to the plaintiffs as to the merits of the appeal and the counterclaim. They were constrained by time and had to act immediately to prepare for the appeal. (paras 136 & 137)

(6) The issue of failure to seek surplus proceeds from the sale of the land was a non-starter. Firstly, the plaintiff had not adduced any evidence to show that there were any surplus proceeds from the sale of the property by CIMB Bank. Secondly, as the title of the plaintiff to the property was not defeasible, he had no interest in the said land and any surplus would be paid to the original owner of the land and not him. (paras 144 & 145)

Obiter:

(1) The draft submissions were not convincing. Even if the draft submissions had been filed, full arguments ventilated as suggested by the plaintiff and the counterclaim was not withdrawn, the appeal would have failed. The long-winded and unclear submissions would have most likely attracted substantial criticism from the Court of Appeal. (para 157)

Case(s) referred to:

Allied Maples Group Ltd v. Simmons & Simmons [1995] 1 WLR 1602 ***(refd)***
Arthur JS Hall & Co v. Simons (AP) [2002] 1 AC 615 ***(refd)***
Arthur JS Hall And Co v. Simons and Barratt [2000] UKHL 38 ***(refd)***
Au Meng Nam & Anor v. Ung Yak Chew & Ors [2007] 4 CLJ 526 CA ***(refd)***
CIMB Bank Bhd v. Abdul Rafi Abdul Rajak & Ors [2013] 3 CLJ 397 HC ***(refd)***
CIMB Bank Bhd v. AmBank (M) Bhd & Ors [2017] 9 CLJ 145 FC ***(refd)***
Kitchen v. Royal Air Force Association [1958] 1 WLR 56 ***(refd)***

Lim Soh Wah & Anor v. Wong Sin Chong & Anor & Another Appeal [2001] 2 CLJ 344 CA ***(refd)***
May v. Pettman Smith (A Firm) [2005] 1 WLR 581 ***(refd)***
MMC Oil & Gas Engineering Sdn Bhd v. Tan Bock Kwee & Sons Sdn Bhd [2016] 4 CLJ 665 CA ***(refd)***
Mount v. Baker Austin (A Firm) [1998] PNLR 493 ***(refd)***
Ngan Siong Hing v. RHB Bank Bhd [2014] 3 CLJ 984 CA ***(refd)***
Nyo Nyo Aye v. Kevin Sathiaseelan Ramakrishnan & Anor And Another Appeal [2020] 5 CLJ 82 CA ***(refd)***
Pang Yeow Chow v. Advance Specialist Treatment Engineering Sdn Bhd [2014] 8 CLJ 188 CA ***(refd)***
Perry v. Raleys Solicitors [2019] UKSC 5 ***(refd)***
Saif Ali v. Sydney Mitchell [1980] AC 198 ***(refd)***
Shariff And Other v. Garrett & Co (A Firm) [2002] 3 All ER 195 ***(refd)***
Shearn Delamore & Co v. Sadacharamani Govindasamy [2017] 2 CLJ 665 CA ***(refd)***
Sri Alam Sdn Bhd v. Tetuan Radzuan Ibrahim & Co [2010] 1 CLJ 913 HC ***(refd)***
T Sivam Tharamalingam v. Public Bank Bhd [2018] 6 CLJ 1 FC ***(refd)***
Tenaga Nasional Bhd v. Tetuan Ariff & Co [2014] 1 CLJ 1112 HC ***(refd)***
Tetuan Theselim Mohd Sahal & Co & Ors v. Tan Boon Huat & Anor [2017] 6 CLJ 368 CA ***(refd)***
VG v. Denise Kingsmill [2001] EWCA Civ 934 ***(refd)***
Wong Kiong Hung & Anor v. Chang Siew Lan & Another Appeal [2009] 3 CLJ 751 CA ***(refd)***

Legislation referred to:
National Land Code, s. 340(3)

For the plaintiff - Ramesh Sivakumar, Goik Ken Zin & Calvin Lin Sin Guan; M/s Goik Ramesh & Loo
For the 1st & 2nd defendants - Witter Yee; M/s Skrine
For the 3rd defendant - In person
For the 5th defendant - WS Saw; M/s Ranjit Singh & Yeoh

Reported by Lina E

JUDGMENT

Mohd Arief Emran Arifin JC:

Introduction

[1] The plaintiff claims that the defendants had been negligent in the conduct of the appeal of the civil suit appeal number J-01(NCVC)(W)-389-09-2012 ("civil appeal"). I note that the action against the fourth defendant was struck out by the court and the trial continued only against the other defendants. Particulars of negligence appear in para. 31 of the statement of claim which is reproduced below:

(i) failing or neglecting to address or ventilate the remaining grounds of appeal as set out in the amended memorandum of appeal; and/or

(ii) failing or neglecting to address the remaining issues raised in the plaintiff's own written submission; and/or as raised in counsel's written submissions and/or

A (iii) failing or neglecting to seek any prior instruction or at all from the plaintiff on the withdrawal or abandonment of the remaining grounds of appeal as set out in the amended memorandum of appeal; and/or

(iv) failing or neglecting to give or render the necessary legal advice or considered opinions or at all to enable the plaintiff to make an B informed decision whether or not to withdraw the remaining grounds of appeal as set out in the amended memorandum of appeal and/or to withhold from addressing the remaining issues raised in the plaintiff's written submissions and/or counsel's written submissions or to withdraw the plaintiff's civil appeal on the dismissal of the plaintiff's C counterclaim against the third and fourth respondents in the said civil appeal; and/or

(v) failing or neglecting to seek any prior instruction or at all from the plaintiff to withdraw the plaintiff's civil appeal on the dismissal of the plaintiff's counterclaim against the third and fourth respondents in the D said civil appeal; and/or

(vi) failing or neglecting to carry out or conduct or at all any relevant research and analyse the relevant laws or case authorities relating to the issues at hand on the grounds of appeal as stated in the amended E memorandum of appeal before the hearing of the civil appeal which would have shown the importance and significance of all the 46 grounds of appeal as set out in the amended memorandum of appeal or issues submitted in the plaintiff's written submissions; and/or

(vii) failing or neglecting to demonstrate or exhibit as a reasonably F competent counsel or proper conduct in the discharge of their duties as owed to the plaintiff; and/or

(viii) failing or neglecting to give full or proper due care, skill or diligence and/or attention in or conducting the civil appeal; and/or

G (ix) failing or neglecting to seek any direction from the court of appeal as to whether the plaintiff is entitled to surplus proceeds of monies if any are left over after defraying the loan monies owing to CIMB Bank in the event of an auction sale being carried out by CIMB Bank following the Court of Appeal's decision dismissing the civil appeal herein.

H **[2]** The plaintiff further alleges that the defendants have breached their contractual obligations to him by failing to provide legal services professionally and lacked due care, skill, and diligence in the prosecution of the civil appeal and related proceedings thereto.

[3] As a result, the plaintiff claims the following damages against the I defendants:

(i) loss of value of the land approximately RM10 million;

(ii) costs of the proceedings in the High Court, Court of Appeal and the Federal Court paid to CIMB Bank;

(iii) legal fees paid to the defendants;

(iv) legal fees at the Court of Appeal; and

(v) legal fees for leave to the Federal Court.

Total RM10,415,000.

[4] The defendants deny the allegations proffered against them, instead, they state:

(i) the first and second defendants had acted as solicitors and conducted themselves to the standards expected of a similar advocate and solicitor.

(ii) the first and second defendants had acted with due diligence and in the best interest of the plaintiff.

(iii) the first and second defendants had acted in accordance with the instructions of the plaintiff.

(iv) the first and second defendants did not breach their contractual duties to the plaintiff.

(v) the first and second defendants had only taken over the civil appeal from the previous solicitors and were not involved in the civil proceedings before Vernon Ong J.

(vi) the third defendant did act with reasonable care, skill and with the appropriate diligence expected of a counsel conducting an appeal from a decision of the High Court.

(vii) the third defendant had only acted as counsel for the civil appeal and was not involved in the civil proceedings before Vernon Ong J.

(viii) the third defendant did obtain all instructions with the solicitors, the first and second defendants.

(ix) the third defendant had undertaken all appropriate work relating to the said civil appeal and had discussed the argument/submissions put to the court of appeal with instructing solicitors.

(x) the third defendant had also explained the argument/submissions put to the Court of Appeal with the plaintiff during the 30 minutes short break on 15 March 2013 and the plaintiff agreed to the argument presented or at the very least did not direct that the remainder of the arguments raised in the memorandum of appeal be pursued at the hearing.

(xi) all of the defendants did act in accordance with the instructions of the plaintiff and did act following their duties to the plaintiff and did act in the best interest of the plaintiff.

Background Facts

The Civil Proceeding Instituted By CIMB Bank Berhad Against The Plaintiff

[5] I must explain the facts of the civil proceedings brought against the plaintiff in the civil suit bearing number 23NCVC-158-2011 before the High Court of Malaya in Johor Bahru.

[6] CIMB Bank had filed a claim against, *inter alia*, the plaintiff seeking to reinstate its charge over a land held under GM 46, Lot 1107, Mukim Senai-Kulai, Daerah Kulaijaya, Negeri Johor. I also note that in response to the said claim by CIMB Bank, the plaintiff did file his defence and counterclaim against CIMB Bank and the Land Administrator of Kulaijaya, Johor Bahru.

[7] In the said defence and counterclaim, the plaintiff relies on, *inter alia*, the alleged *locus standi* of CIMB Bank to deny the plaintiff the right to the said property and for an order that the registrar's caveat on the said land is removed and damages for wrongful entry of the private caveat.

[8] The original charge was held by Cempaka Finance Berhad but through a series of mergers and acquisitions eventually vested and transferred to CIMB Bank Berhad.

[9] The said charge was wrongfully removed by a false or fraudulent Form 16N presented at the land office on 26 August 1999. The land was subsequently transferred to one Abdul Rafi by way of the memorandum of transfer dated 21 April 2010.

[10] The land was subsequently sold to the plaintiff for the consideration of RM5,000,000 through the memorandum of transfer dated 19 August 2010 which was also registered at the Kulaijaya Land Office.

[11] CIMB Bank Bhd found that the charge was wrongfully removed and instituted proceedings to reinstate the said charge and challenge the title held by Abdul Rafi and the subsequent sale to the plaintiff.

[12] CIMB Bank Bhd was successful in the aforesaid civil suit and Vernon J (as he then was), *inter alia*, found:

> [45] Be that as it may, the existence of a sale and purchase agreement and the payment of the full purchase price is not the sole indicator to show that a person is a *bona fide* purchaser or otherwise. It is also necessary to consider other salient features surrounding the SPA. A purchaser in good faith does not include a purchaser who is careless or who had been negligent (*Au Meng Nam*, *supra*).
>
> [46] Kumarappan's evidence that he conducted a land valuation prior to entering into the SPA does not appear to be supported by the documentary evidence. The three valuation reports (exhs. D36, D95 and D98) were conducted on 21 September 2010, 13 July 2010 and 9 September 2010 respectively which were subsequent to the SPA. It is

also pertinent to note that no bankruptcy search was conducted on Abdul Rafi by DW2 or by Kumarappan prior to the execution of the SPA. Both Kumarappan and Abdul Rafi disregarded the express provisions of the SPA on a number of occasions – (i) when the second MOT and the original title deed to the land was handed to Kumarappan instead of DW2 in contravention of cl. 4.4; (ii) when the second MOT was presented for registration before the full purchase price was paid in contravention of cls. 4.3 and 4.4; (iii) even though the full purchase price was not paid within the completion date, no late penalty interest was paid to Abdul Rafi under cl. 2.2; and (iv) DW2's legal firm did not retain 2% of the purchase price for RPGT purposes under cl. 19 and as required by law.

[47] Further, it is impossible to ignore the significant fact that the purchase price of RM5 million was paid in cash. RM5 million is a very substantial sum of money. Payment of such sums in cash and in the circumstances as described by Kumarappan and DW4 are not only unusual but also careless and extremely risky in the circumstances – in relation to the carrying of hundreds of thousands of Ringgit on 11 occasions to the money changer and the unauthorised foreign exchange transactions conducted through the money changer. There is also a material discrepancy in the letter of authorisation (exh. D40). The letter dated 19 May 2010 refers to discussion on 12 August 2010. The fact that this letter refers to an event in the future is a contradiction in terms; it is not plausible. This contradiction renders this letter to be suspect and devoid of any probative value.

[48] It is also pertinent to observe that notwithstanding that Abdul Rafi had not yet received the full purchase price, he was prepared to create an irrevocable power of attorney giving Kumarappan full powers to deal with the land. This is also an unusual feature of this land sale transaction; it defies logic as no reasonable vendor would divest himself of his powers to deal with the land until the full purchase price is paid or unless there is other security for the payment of the purchase price.

[49] It is equally pertinent to observe that according to the presentation statement (exh. P29) the second MOT was purportedly presented for registration made by 'M/s James Wong & Co' at the Kulaijaya Land Office. 'Messrs James Wong & Co' is a non-existent legal firm; PW1 testified that there is no record of such a legal firm registered with the Bar Council. Kumarappan produced another copy of the presentation statement (exh. D66) which shows Kumarappan's name written by hand and the name of 'M/s James Wong & Co' struck through.

[50] The question of whether Abdul Rafi is still alive or dead is of no consequence to the question in hand. It is evident that the discharge of the charge is null and void. It is also evident that Abdul Rafi's title to the land should be set aside on the ground that the transfer was procured by fraud and a void instrument. The circumstances surrounding the sale and purchase of the land between Abdul Rafi and Kumarappan are not entirely straightforward. The court is not satisfied that at all material times Kumarappan was not aware that Abdul Rafi's title to the land was suspect. The manner in which the sale transaction was entered into, the

A cash payments of the RM5 million purchase price, the transfer of the monies to Abdul Rafi in India through a money changer, the creation of the irrevocable power of attorney in favour of Kumarappan and the fictitious legal firm which purportedly presented the transfer documents at the Kulaijaya Land Office can only be described as incongruous. On the totality of the evidence and findings aforesaid, the court is driven to
B the conclusion that Kumarappan has failed to prove that he is a purchaser of the land in good faith for valuable consideration.

[13] The full grounds for the said case could be seen in *CIMB Bank Bhd v. Abdul Rafi Abdul Rajak & Ors* [2013] 3 CLJ 397. In the High Court the plaintiff was represented by M Manoharan and R Devi from
C Messrs M Manoharan & Co. Judgment was entered against the plaintiff in favour of CIMB Bank on 10 August 2012.

Civil Appeal And The Engagement Of The Defendants As Solicitors And Counsel For The Plaintiff

D **[14]** Unhappy with the said decision, the plaintiff filed an appeal to the Court of Appeal. The plaintiff initially utilised the services of Messrs A I Nathan & Co who took over from Messrs M Manoharan & Co. The plaintiff eventually decided to appoint the first and second defendants to represent him and act as solicitors for the civil appeal replacing Messrs
E A I Nathan & Co.

[15] I find that the plaintiff had earlier engaged the services of one Thayalan Ratnavelu as counsel to assist with the conduct of the civil appeal.

[16] I also find that at the material time, the plaintiff was also assisted by
F his friend, Rajentharan a/l Nadesan. It appears that the memorandum of appeal and the amended memorandum of appeal were drafted by the said Rajentharan a/l Nadesan ("Rajentharan").

[17] The plaintiff contends that his friend Rajentharan a/l Nadesan had prepared a draft submission to be utilised for the civil appeal. A copy was
G prepared by the said Rajentharan a/l Nadesan and forwarded a copy of the same to the first and second defendants. This is seen in the email dated 22 January 2013 issued by Rajendaran using the email known as Rajendaran Bonaparte (rajendaran@hotmail.com) to the plaintiff. The plaintiff then forwarded the same attachment to the first and second defendants.

H **[18]** I must note that in the email dated 22 January 2013, the said Rajendaran stated in his email (who the plaintiff stated is his friend Rajentharan):

> Attached herewith is the written submission for submission to Court of Appeal on Kulaijaya land matter for your comments and adoption.

I **[19]** The plaintiff on the other hand only forwarded the same email to the first and second defendants without any instructions stated in his forwarding email. He did not direct in the email that the said submissions must be

adopted *in toto* or that all the issues stated in the submissions must be addressed by the first and second defendants or by any counsel acting for the plaintiff.

[20] On 23 November 2012 Rajendaran also issued an email to the plaintiff attaching an application to amend the memorandum of appeal, the affidavit in support of the application and the proposed amendment of the memorandum of appeal.

[21] The application to amend the memorandum of appeal was filed on or about 28 November 2012 by the first and second defendants. The Court of Appeal allowed the memorandum of appeal to be amended and the said defendants had duly filed the amended document in court.

[22] The civil appeal was initially fixed for hearing on 23 January 2013 but was adjourned due to the health of counsel, Thayalan Ratnavelu, at that time. The civil appeal was adjourned to 15 March 2013.

[23] For reasons unknown to this court, the plaintiff could not retain the services of Thayalan Ratnavelu for the civil appeal. The plaintiff then decided to seek assistance from other potential counsels who were willing and able to act in the civil appeal. The plaintiff also asked the first and second defendants for their assistance and suggestion on the counsel to be utilised for the said civil appeal.

[24] The second defendant had sought assistance from R R Chelliah to agree to act on behalf of the plaintiff. The said advocate and solicitor however did not agree to act on behalf of the plaintiff. R R Chelliah was not called to give evidence to explain why he refused to act on behalf of the plaintiff.

[25] The first and second defendants, or at least the second defendant, sought the assistance of the third defendant to act as counsel for the civil appeal on behalf of the plaintiff. The third defendant after considering the documents forwarded to him by the second defendant, agreed to act on behalf of the plaintiff.

[26] Rajendaran issued an email dated 11 March 2013 to the first and second defendants forwarding a copy of the earlier written submissions, referred to in para. 18, and seeking clarification whether (i) written submissions have been finalised, (ii) whether they need to meet to discuss the proposed submissions, and (iii) whether they need assistance from him to attend as co-counsel at the Court of Appeal.

[27] Various meetings were held between the defendants, either at the office of the third defendant or *via* telephone calls, to discuss the merits of the civil appeal and the arguments to be put up for consideration to the Court of Appeal. The first and second defendants did forward a copy of all relevant documents, including but not limited to the record of appeal, the grounds of the Vernon Ong J and the draft written submissions prepared by Rajendaran for the third defendant to peruse and consider.

[28] Eventually, the third defendant agreed to act on behalf of the plaintiff and began to prepare submissions with the assistance of his associate, R Ramanathan s/o R M Ramanathan, for the civil appeal.

[29] Submissions were prepared by the third defendant, and this was forwarded to the first and second defendants for their consideration. The third defendant's firm had sent an email dated 10 March 2013 attaching a copy of the written submissions to the first and second defendants. The first defendant had also forwarded a copy of the said submissions to the plaintiff at his email address known as pkumar68@streamyx.com and pkumurappan @gmail.com on or about 14 March 2013 at about 4.09pm.

[30] Parties agreed that the plaintiff and the first and second defendants met at the aforesaid defendants' office on the evening of 14 March 2013 to discuss the submissions drafted by the third defendant. The final written submissions were filed by the third defendant's firm with the bundle of authorities.

[31] The civil appeal was heard on 15 March 2013 that was attended by the defendants acting on behalf of the plaintiff.

[32] The defendants, through the third defendant, decided to only pursue the issue of CIMB's right or *locus standi* of CIMB Bank Berhad to issue proceedings against the plaintiff instead of the other issues allegedly highlighted in the earlier written submissions and all the other issues stated in the draft prepared by Rajendaran. The other issues were abandoned by the defendants during the hearing of the civil appeal. The third defendant also withdrew the counterclaim against CIMB Bank Berhad and Kulaijaya Land Office.

[33] The Court of Appeal after deliberating on the issue raised by the defendants decided to dismiss the appeal.

[34] The plaintiff issued a notice to the first and second defendants dated 16 March 2013 requesting that the firm officially inform him of the decision of the Court of Appeal, the reasons for the said decision of the Court of Appeal and whether counsel/solicitors did submit on all of the issues or grounds stated in the grounds of appeal.

[35] The first and second defendants issued a response dated 19 March 2013 and 22 March 2013. I note that the response dated 19 March 2013, email was sent to pkumar68@streamyx.com and pkumarappan@gmail.com. The said notice dated 19 March 2013 was then forwarded by the plaintiff from his Gmail account to murali@rradvocates.com and we4i@yahoo.com.

[36] The plaintiff then issued his response to the first and second defendants dated 22 March 2013.

[37] The plaintiff had also issued a complaint to the Bar Council dated 3 April 2013 against the defendants.

[38] The first and second defendants issued a notice dated 10 April 2013 informing the plaintiff that they will no longer act for him. This was attached to the email dated 11 April 2013.

[39] The third defendant issued a written explanation to the Advocates and Solicitors Disciplinary Board by letter dated 31 July 2013.

[40] On 6 August 2013, the Advocates and Solicitors Disciplinary Board forwarded a copy of the above-referred written explanation to the plaintiff.

[41] A response to the said written explanation was issued by the plaintiff to the Advocates and Solicitors Disciplinary Board by letter dated 3 September 2013 and 17 September 2013.

[42] The plaintiff sought leave to appeal to the Federal Court with the assistance of Dato K Kirubakaran, Sri Dev Nair and Rajendran Nadesan against the decision of the Court of Appeal. The application was dismissed on 12 November 2013.

[43] The Advocates and Solicitors Disciplinary Board sat to consider the complaint lodged by the plaintiff on 26 November 2015 after various adjournments were granted at the request of the parties. On the said hearing date, as the alleged bundles of documents were missing, the plaintiff decided to withdraw the complaint with the right to file afresh. I note the subsequent complaints issued by the plaintiff against the Advocates and Solicitors Disciplinary Board dated 9 December 2015.

[44] The plaintiff then lodged a fresh complaint against the defendants *via* letter dated 16 December 2015. This led to a further response from the defendants dated 14 March 2016, 13 April 2016 and the plaintiff dated 29 June 2016.

Issues In Dispute

[45] I opine that the pleadings disclose that the issues in dispute are as follows:

(i) whether the plaintiff had instructed the defendants to pursue all points raised in his memorandum of appeal, the draft written submissions written by Rajentharan or the written submissions filed by the third defendant;

(ii) whether the defendants are negligent and are in breach of their contract by failing to argue all the points contained in the plaintiff's memorandum of appeal, the draft written submissions written by Rajentharan or the written submissions filed by the third defendant;

(iii) whether the defendants were negligent or acted in breach of their contract by arguing only a single issue of CIMB Bank Bhd's *locus standi* at the Court of Appeal hearing;

(iv) whether the defendants were negligent or acted in breach of their contract by withdrawing the counterclaim against CIMB Bank Bhd and Kulaijaya Land Office;

(v) whether the defendants were negligent or acted in breach of their contract by failing to obtain the plaintiff's consent or failing to advise the plaintiff on the decision to withdraw the counterclaim and the decision not to argue all the other issues raised in the memorandum of appeal, in the submissions of Rajentharan or the written submissions filed by the third defendant as well as the withdrawal of the plaintiff's counterclaim;

(vi) whether the defendants had been negligent in failing to conduct all necessary research which would have shown the importance of the other issues raised in the memorandum of appeal, in the submissions of Rajentharan or the written submissions filed by the third defendant as well as the counterclaim by the plaintiff;

(vii) whether the defendants had been negligent or acted in breach of their contract by failing to act as a reasonable competent counsel or by failing to act in the discharge of their duties owed to the plaintiff; and

(viii) whether the defendants had been negligent or acted in breach of their contract by failing to seek any instruction from the Court of Appeal as to surplus proceeds from the monies realised from the foreclosure of the land that the plaintiff believes should be paid to the plaintiff;

Law On The Duty Of Solicitors And Counsel To Their Clients

[46] It is trite law that an advocate of solicitors owes a duty of care and duty of fidelity to his or her client. However, this duty is tempered by the advocate's duty to court and that he or she is not merely a mouthpiece of the client.

[47] I refer to the decision of Gopal Sri Ram JCA (as he then was) in *Lim Soh Wah & Anor v. Wong Sin Chong & Anor & Another Appeal* [2001] 2 CLJ 344 where he eruditely stated:

> Advocates and solicitors undertake an onerous task when they agree to act for a client. *There is an assumption of responsibility by the solicitor coupled with reliance by the client on the skill of the solicitor. The solicitor's duty to exercise reasonable care and skill is imposed both by contract and by the law of tort*.
>
> (emphasis added)

[48] The burden that lies on the shoulder of an advocate and solicitor or any professional to act in the best interest of a client is onerous and can be seen in the decisions of the Court of Appeal in *Shearn Delamore & Co v. Sadacharamani Govindasamy* [2017] 2 CLJ 665; *Tetuan Theselim Mohd Sahal & Co & Ors v. Tan Boon Huat & Anor* [2017] 6 CLJ 368; *Nyo Nyo Aye v. Kevin*

Sathiaseelan Ramakrishnan & Anor And Another Appeal [2020] 5 CLJ 82; *Pang Yeow Chow v. Advance Specialist Treatment Engineering Sdn Bhd* [2014] 8 CLJ 188; and *Wong Kiong Hung & Anor v. Chang Siew Lan & Another Appeal* [2009] 3 CLJ 751; [2009] 4 MLJ 183.

[49] Harmindar Singh Dhaliwal JCA (as His Lordship then was) stated in *Tetuan Theselim Mohd Sahal v. Tan Boon Huat* (*supra*):

> [30] Thus, whether the first defendant, and in particular the second defendant, who was the solicitor handling the transaction, were negligent may be determined by a consideration of the following questions:
>
> (i) whether the standard of care practiced by the second defendant was the same standard of reasonably competent solicitors in conveyancing practice; and
>
> (ii) whether the second defendant had acted with diligence in exercising the reasonable care and skill expected to assist the completion of the SPA.

[50] I must note merely because an advocate and solicitor chose to pursue an argument or a position that another advocate and solicitors might disagree with does not mean he or she is negligent. Errors of judgment by an advocate do not automatically mean that he or she is negligent. He or she is to be judged based on whether a reasonably "well informed" and competent member of that profession could have made the same decision as that undertaken by the advocate".

[51] The decision of Lord Wilberforce delivering the majority decision in *Saif Ali v. Sydney Mitchell* [1980] AC 198 is important and must be considered by this court. Although I note that this decision is no longer a good law on the issue of immunity of barristers in the England and Wales as that has now been overtaken by the subsequent decision of the House of Lords in *Arthur JS Hall & Co v. Simons (AP)* [2002] 1 AC 615.

[52] Nonetheless, I find that the judgment of Lord Wilberforce is helpful as one of the issues that arose, in that case, is whether a decision or judgment call by a barrister undertaken during the conduct of a case could be considered negligent.

[53] In that case Lord Wilberforce held:

> The second is that of the defences available to barristers. Much if not most of a barrister's work involves exercise of judgment – it is in the realm of art not science. Indeed the solicitor normally goes to counsel precisely at the point where, as between possible courses, a choice can only be made on the basis of a judgment, which is fallible and may turn out to be wrong. Thus in the nature of things, an action against a barrister who acts honestly and carefully is very unlikely to succeed. But this is not an argument for giving him total immunity from proceedings.
>
> ...

A The fact that application of the rules that a barrister must observe may in particular cases call for the exercise of finely balanced judgments upon matters about which different members of the profession might take different views, does not in my view provide sufficient reason for granting absolute immunity from liability at common law. *No matter what profession it may be, the common law does not impose on those who practise it any liability* B *for damage resulting from what in the result turn out to have been errors of judgment, unless the error was such as no reasonably well-informed and competent member of that profession could have made. So too the common law makes allowance for the difficulties in the circumstances in which professional judgments have to be made and acted upon*. (emphasis added)

C **[54]** The same opinion is seen in the judgment of Lord Salmon in the same case:

I am far from saying that if the advice or document turns out to be wrong, it necessarily follows that he who gave or drew it is liable for the loss caused by its imperfection. *The barrister is under no duty to be right; he is only* D *under a duty to exercise reasonable care and competence. Lawyers are often faced with finely balanced problems. Diametrically opposite views may and not infrequently are taken by barristers and indeed by judges, each of whom has exercised reasonable, and sometimes far more than reasonable, care and competence. The fact that one of them turns out to be wrong certainly does not mean that he has been negligent*. (emphasis added)

E **[55]** I also refer to the decision of Harminder J (as he then was) in *Sri Alam Sdn Bhd v. Tetuan Radzuan Ibrahim & Co* [2010] 1 CLJ 913; [2010] 1 MLJ 284, where he made similar observations:

... it is now accepted that advocates and solicitors owe concurrent duties F in contract and in tort (*Midland Bank Trust Co Ltd & Anor v. Hett, Stubbs & Kemp (a firm)* [1979] Ch 384; *Saif AH v. Sydney Mitchell*). *Their duty is to exercise reasonable degree of care and skill as with all professions. He or she is to be judged by what reasonably competent practitioners would do* although a lawyer is to be judged according to the standards of practitioners of his own standing and seniority. (emphasis added)

G **[56]** In claims that arise out of a loss of opportunity or loss of chance, I must also take into consideration the legal proposition laid down by Vazeer Alam Mydin Meera JC in *Tenaga Nasional Bhd v. Tetuan Ariff & Co* [2014] 1 CLJ 1112 in determining whether the said act did cause any damage to the plaintiff.

H **[57]** The issue of causation of damages in loss of chance claims was explained by the UK Supreme Court in *Perry v. Raley Solicitors* [2019] UKSC 5 and by the Court of Appeal in *Allied Maples Group Ltd v. Simmons & Simmons* [1995] 1 WLR 1602.

I

[58] I refer to the judgment of Lord Briggs in *Perry v. Raley Solicitors* (*supra*) where he stated:

> 25. Applied to the present case, the principle that the client must prove on the balance of probabilities that he would have taken any necessary steps required of him to convert the receipt of competent advice into some financial (or financially measurable) advantage to him means that Mr Perry needed to prove that, properly advised by Raleys, he would have made a claim to a Services Award under the Scheme within time. To this the judge added that it would have to have been an honest claim. He made this addition upon the basis of a concession to that effect by counsel on Mr Perry's behalf, from which Mr Watt-Pringle QC for Mr Perry (who did not appear at the trial) invited this court to permit him to resile, so that the question whether the honesty of the claim was a requirement of Mr Perry's cause of action could be properly argued.
>
> 26. Having heard commendably concise argument on the point, I consider that the concession was rightly and properly made. In *Kitchen v. Royal Air Force Association* [1958] 1 WLR 563 the plaintiff's husband, a member of the RAF, was electrocuted and killed in the kitchen of his house. His widow lost the opportunity to bring a claim under the Fatal Accidents Act in time due to the negligence of the defendant solicitors. In a leading judgment on the evaluation of the loss of a chance, Lord Evershed MR said this, at p. 575:
>
> > I would add, as was conceded by Mr Neil Lawson, that in such a case it is not enough for the plaintiff to say: 'Though I had no claim in law, still, I had a nuisance value which I could have so utilised as to extract something from the other side and they would have had to pay something to me in order to persuade me to go away.'
>
> If nuisance value claims fall outside the category of lost claims for which damages may be claimed in negligence against professional advisors, then so, *a fortiori*, must dishonest claims.
>
> 27. That simple conclusion might be thought by many to be too obvious to need further explanation, but it may be fortified in any of the following ways. First, a client honestly describing his condition to his solicitor when considering whether to make a personal injuries claim would not be advised to do so if the facts described did not give rise to a claim. On the contrary, he would be advised not to waste his own money and time upon the pursuit of pointless litigation. Secondly, the court when appraising the assertion that the client would, if properly advised, have made a personal injury claim, may fairly presume that the client would only make honest claims, and the client would not be permitted to rebut that presumption by a bald assertion of his own propensity for dishonesty. Thirdly, the court simply has no business rewarding dishonest claimants. The extent of dishonest claims for minor personal injuries such as whiplash (which are difficult to disprove) in road traffic accident cases is already such a blot upon civil litigation that Parliament has considered it necessary to intervene to limit that abuse.

[59] Based on the aforesaid, I summarise the legal position as follows:

(i) an advocate and solicitors owe a concurrent duty in contract and tort to their clients;

(ii) in the course of their work, they must exercise a reasonable degree of care and skill and act in the best interest of their clients;

(iii) the standard to which the advocate and solicitor will be judged is that of a reasonably competent practitioner of similar standing and seniority;

(iv) if they have exercised reasonable care in the conduct of their task on behalf of the client, the fact that he or she may have taken an opposite view or opinion to that of another advocate does not mean he or she is negligent. This will depend on the facts of each case;

(v) the advocate however may be found negligent if the "error was such as no reasonably well-informed and competent member of that profession could have made." Examples of such failure include, but are not limited, to failing to comply with instructions issued by clients or failing to attend a hearing date or failing to file a claim within a limitation period;

(vi) the advocate will be held liable if the failure to act in accordance with the above duty of care did cause damage to the plaintiff;

(vii) for a litigant to be successful in a claim against a professional for negligence, in a claim for loss of chance, it must be shown that the client had lost "something of value or whether on the contrary, his prospects of success in the original action were negligible". I must also assess "what would have been the plaintiff's prospects of success had the original litigation been fought out'; and

(viii) the court does not accept negligible claims, dishonest claims or claims that are merely filed for nuisance purposes.

My Findings – Whether The Defendants Have Been Negligent Or Breached Their Contractual Duties Owed To The Plaintiff

[60] Having considered the evidence garnered from the following witnesses enumerated below, I opine that the plaintiff has failed to prove that the defendants were negligent in the conduct of the civil appeal.

(i) PW1 Rajentharan a/l Nadesan; and

(ii) PW2 Kumarappan @ Thannirmalai a/l K M Palaniappan.

[61] I also find that the said defendants did not commit any alleged wrongs as suggested by the plaintiff either in tort or in contract.

[62] My detailed reasons are provided in the following paragraphs. A

Whether The Plaintiff Had Instructed The Defendants To Pursue All Points Raised In His Memorandum Of Appeal, The Draft Written Submissions Written By Rajentharan Or The Written Submissions Filed By The Third Defendant

B

[63] The first issue I will deal with concerns the plaintiff's contention that he had instructed the defendants to pursue all the issues raised in his memorandum of appeal, the draft written submissions written by Rajentharan or the written submissions by the third defendant.

[64] I have considered the evidence of Rajentharan (PW1) and the plaintiff in their witness statements. I accept that the plaintiff states that he takes an active role in the conduct of the cases in which he is involved, especially the proceedings in Johor Bahru and the civil appeal. To be clear, I have also considered the evidence of all of the other witnesses brought by the plaintiff and the defendants on this issue. C D

[65] I also accept that the plaintiff relies substantially on the advice and assistance that he frequently obtains from Rajentharan. This appears in the allegation that the pleadings and the memorandum of appeals as well as the draft submissions were prepared by Rajentharan.

E

[66] I also note that the plaintiff contends that he gave strict instructions to the defendants, directly to the first and second defendants and to the third defendant to proceed with the arguments fully on all points raised at various meetings, discussions, and alleged telephone calls.

[67] The plaintiff states this in many instances in his witness statements in answers to questions number 16, 19, 21, 22, 23, 26, 28, 31, 34 and 35 of his witness statements. He also alleges that it was important for him to have all these issues ventilated as he had removed Messrs A I Nathan earlier on their refusal to amend the memorandum of appeal. F

[68] The plaintiff also contends that he had reminded the first defendant as well as the other defendants even during the break at the hearing on 15 March 2013. He also refers to his subsequent letter dated 16 March 2013 as well as the complaints lodged with the Bar Council Disciplinary Board on the failure of the defendants to comply with his alleged explicit instructions. G

[69] I am however not convinced that he had given such explicit instructions. H

[70] Firstly, I do not find any documentary evidence that was issued before the hearing of the civil appeal (15 March 2013), that the plaintiff had recorded his instructions that all the civil appeal must be ventilated before the Court of Appeal. I

[71] I find that if this was the case, the plaintiff would have surely recorded this either in an SMS, email or any letter to the first and second defendants. He was after all a client who takes it personally to be involved in the preparation of the case. He would have surely ensured that all such instructions be put in writing and reminded the defendants that all of these arguments must be included in any written submissions or any arguments to be put to the Court of Appeal.

[72] I have also considered the SMS exchanged between the plaintiff and the first defendant. I do not find any mention of any instruction given by the plaintiff to the first defendant instead they only contain general discussions on the civil appeal and even complaints against previous counsels. This does not bode well for the plaintiff if he wants this court to believe that there was such a discussion and a specific instruction to the defendants to ventilate all the points raised in the memorandum of appeal.

[73] The emails exchanged between parties dated 23 November 2012, 22 January 2013 and 14 March 2013 are also important.

[74] I find that the plaintiff had only forwarded the draft of submissions of the civil appeal, affidavits and notice of the application to amend the memorandum of appeal without any specific instructions. The plaintiff did not specifically state that the said submissions must be adopted *in toto* and that the defendants are required to include all the points for consideration at the Court of Appeal.

[75] I find that this is inconsistent with the plaintiff's averment that he gave instructions to the defendants to ensure all the said 46 points be raised at the Court of Appeal. I opine that if this is true, surely the plaintiff would have specifically stated in the emails of his instructions that all these points suggested by Rajentharan are adopted in the written submissions at eventually argued by counsel at the appeal.

[76] My view is further strengthened by the fact that on 14 March 2013, the draft written submissions were prepared and attached in the email by the third defendant to the first defendant which was eventually sent to plaintiff.

[77] The submissions clearly show that the defendants decided not to pursue substantial parts of the arguments that were suggested by Rajentharan. Instead, in the said draft the third defendant only wanted to pursue only the issue of (i) *locus standi* of CIMB Bank Bhd, (ii) the alleged non-*bona fides* on the part of the plaintiff and (iii) the alleged failure of Vernon J to consider the evidence before court (judicial appreciation of facts).

[78] I note that the plaintiff alleges that he did not receive this submission during cross-examination and the allegation that even Rajentharan only received this subsequently on the date of the hearing itself instead of on 14 March 2013. The plaintiff also alleges that he did not receive the said email as it was sent to his old Streamyx account.

[79] However, I find that the plaintiff did receive the said submissions. The said email from the first defendant was sent to his Gmail account and he eventually sent the said submissions to Rajentharan in the email dated 16 March 2013 from the same Gmail account.

[80] Secondly, the plaintiff did state in his answers to his witness statement in question 34 that he did receive the said submissions and was unhappy with it. He alleges that he then went to the first and second defendants' office and demanded an explanation why they decided not to argue all the issues raised by him and Rajentharan instead of the three issues raised.

[81] Therefore, the plaintiff's contention that he did not receive the said email and submissions as suggested by him during cross-examination is not true.

[82] I also find that the preponderance of evidence before me indicates that it is more likely than not that the plaintiff had left the issues to be argued to be determined by the third defendant and he did not give any specific instruction as suggested by him.

[83] The plaintiff himself admits that it was clear from the submissions attached to the email dated 14 March 2013 that the other points suggested by Rajentharan have been abandoned. To understand the reason for the said abandonment, he then went to the office of the first and second defendants to discuss the said submissions.

[84] I find that if he was so unhappy with the situation at that time, he would have surely recorded this issue in an email or SMS with the defendants. As he has said earlier, he is a hands-on client and participated actively in the preparation of the suit and the civil appeal. Surely having read the submissions drafted and the clear intention to abandon all the other arguments, if indeed he was unhappy, he would have complained and recorded this to the defendants to explain in writing immediately on the eve of the appeal. This was not done and indicates to me otherwise.

[85] It was also apparent in the plaintiff's witness statement that he suggests that he had brought eight copies of the written submissions prepared by Rajentharan and said Rajentharan was willing and able to argue the remaining points if the third defendant refuses to do so at the appeal.

[86] I also note that he was present at the hearing of the appeal, and he was aware that the third defendant then chose to only restrict his argument solely on the issue of *locus standi* of CIMB Bank Berhad. plaintiff agreed that this was explained to him during the break suggested by the Court of Appeal to enable parties to discuss on settlement. Of course, I do note that the plaintiff maintains that he insisted that the defendants comply with his strict instructions and should not restrict themselves to the issue of *locus standi*.

[87] However, having found that the third defendant continued to disregard the alleged instructions and failed to raise the other issues suggested by Rajentharan, and only limit the civil appeal to that of *locus standi*, the plaintiff did not then spring to action. I am sure that a litigant who did give such express instructions to counsel, would have been moved to take action to ensure counsel comply. More so when the plaintiff had with him an able counsel and friend who he says was able to take over the matter and ventilate all of these issues. I do not find the plaintiff's version of events as being credible.

[88] Instead, I find that the plaintiff chose to keep quiet during the civil appeal and did not call on the defendants to stop their course of action. After all, he did inform this court that he had access to Rajentharan who was willing and able to argue his case to the bone based solely on the instructions given to him and based on the submissions prepared by him.

[89] To be clear, I have also considered the evidence of Rajentharan, and I do not find his evidence to be convincing. His evidence is far from consistent with the position taken by the plaintiff. A clear example could be seen concerning the issue of his ability and willingness to act as counsel during the hearing and to take over on the other issues raised in his own written submission. Instead of confirming what the plaintiff suggests, he states that he was not properly attired and was not ready to argue the other issues, once they were abandoned by the defendants. Rajentharan's evidence is full of inconsistencies. I find he was unnecessarily defensive. For the above reasons, I cannot rely on his testimony to ascertain the truth.

[90] Furthermore, I find that the plaintiff's evidence is full of contradiction and cannot be believed by this court. If the plaintiff's suggestion is correct and he had given strict instructions to proceed with the other points of appeal, he would have surely been upset when the defendants chose to abandon the other points. A reasonable litigant hearing the position taken contrary to his or her strict instructions would have immediately discharged the defendants at the spot and asked the said Rajentharan to take over. After all, as he suggests, he had a counsel ready to take over or at the very least someone willing to stand and argue on the other points abandoned.

[91] The other point that I believe that no such instructions were given to the defendants is the fact that the plaintiff had access to Rajentharan. He is a friend who had been through thick and thin of the proceedings in the High Court of Malaya in Johor Bahru. He was, as he suggests, privy to the records and was willing to assist the plaintiff. This is also seen in the evidence of the defendants' witnesses who confirmed that the plaintiff had no issues with the proposed strategy suggested by the third defendant.

[92] Rajentharan had also assisted the plaintiff with the drafting of the pleadings, memorandum of appeals and even the lengthy submissions that the plaintiff believes are so profound that they would persuade the appellate judges to set aside finding of facts made by a High Court Judge.

[93] Surely, the best step forward is to appoint Rajentharan instead of the defendants. The said Rajentharan knew all the facts inside out and is aware of all legal arguments that would allegedly persuade the judges that Justice Vernon is wrong. Instead of getting Rajentharan to act, the plaintiff chose to seek the assistance of the first and second defendants and eventually that of the third defendant. After all, he did seek the assistance of other counsels who decided to turn him down. This to me is inconsistent and does not support the plaintiff's allegations that he had insisted or that he gave strict instructions to the defendants. There was no need for a third party to be involved if he only wanted the same arguments drafted by Rajentharan. Who would be better to argue the case, other than the person who assisted from the outset and who even drafted the submissions that the plaintiff believes would render him victorious? Instead, the said Rajentharan came to court without his robes, chose not to argue the appeal and in his own version of events, was not ready to argue the appeal on behalf of the plaintiff.

[94] The decision to seek assistance or services from the defendants suggests to me that the plaintiff wanted the said defendants to exercise their best judgment and decide what would be the best case to present to the Court of Appeal. As I said, he had Rajentharan, whom he believes is a good advocate of many years at the Bar and had the ability and knowledge to present the case. The only reason one would have then sought the services of a third counsel or other advocate is to ensure that they provide their independent views and independent input to the case at hand. Especially, when the earlier arguments were not successful at the High Court and did not persuade a High Court Judge. I find that this is consistent with the version of events suggested by the defendants as seen in their witness statements that withstood cross-examination.

[95] Furthermore, I accept the evidence of the third defendant. He had indicated during cross-examination if he had received such strict instructions from the plaintiff, he would not have agreed to act in the civil appeal. This evidence is consistent with the practice of senior counsels at the Malaysian Bar as indicated from the testimony of Mr Robert Lazar.

[96] Thus, I find that it is most likely than not that the plaintiff did not give such specific instructions but relied on the judgment of the defendants to put forward the best arguments that they deem fit. More so, when the plaintiff sought out counsel to present the case on his behalf and in those circumstances, it is unlikely that counsel would agree to present a case solely on the specific instructions of a client. The decision by the plaintiff not to use Rajentharan itself, to me, shows that the plaintiff's allegations are not true.

[97] I also prefer the evidence of the defendants on this issue. I find that the evidence of the second and third defendants are consistent with each other and do not contain any controversial inconsistencies that could suggest that they are not telling the truth. I find that the evidence of these witnesses together with that of R Ramanathan s/o R Ramanathan suggests that the plaintiff did agree to leave the arguments to be put forward to the Court of Appeal in the hands of the third defendant.

[98] For the above reasons, I find that the plaintiff did not give any instructions to the defendant, at any meetings and not even at the break on 15 March 2013 that all the issues must be ventilated in the High Court. I find that the defendants were retained and were instructed to present the best case they professionally deem fit based subject to their duty of care owed to the plaintiff.

Whether The Defendants Were Negligent In The Conduct Of The Civil Appeal

The Decision To Withdraw The Counterclaim And The Other Points Raised In The Memorandum Of Appeal

[99] I must remind myself that I am dealing with solicitors and counsel that were only engaged at the appeal stage. This is not a case where the solicitors and counsel had taken the brief from the outset. By the time the file came to their lap, the High Court in Johor Bahru had found their client's title to the said land not indefeasible as he has failed to prove that he is a *bona fide* purchaser of value protected under s. 340(3) of the National Land Code.

[100] As seen in the judgment of Vernon J, which I have cited earlier, substantial parts of the finding made against the plaintiff in the said suit, revolve around finding of fact. Vernon J found *inter alia* that the plaintiff is guilty of negligence as:

(i) the strange manner in which the purchase price was paid *via* money lenders;

(ii) the fact that the memorandum of transfer was undertaken *via* a fictitious law firm; and

(iii) how the sale and purchase agreement was not strictly adhered to.

Essentially, the court did not believe that the plaintiff had a *bona fide* belief that Abdul Rafi's title is beyond suspect.

[101] I must also note that at the appellate stage, it is very rare that the Court of Appeal will intervene and overturn a finding of fact made by the High Court unless it is shown that the decision is so wrong that no reasonable judge could have come to the same conclusion. It must be shown that the learned trial judge was plainly wrong. I refer to the decision of the Court of Appeal in *MMC Oil & Gas Engineering Sdn Bhd v. Tan Bock Kwee & Sons Sdn Bhd* [2016] 4 CLJ 665.

[102] I am aware that I am not hearing an appeal against the decision of the High Court in Johor Bahru and it is not my duty or power to decide whether Vernon J had made any errors of law or fact.

[103] However, this is a material consideration. On the issue of the alleged negligence of the defendants, are the said defendants wrong to have decided to withdraw the counterclaim and decide to only rely on a single point at the Court of Appeal as they have done so in the circumstances of this case?

[104] As I have said earlier, the defendants are to be adjudged based on the standards expected of a reasonably competent advocate and solicitor of similar standing and seniority.

[105] Thus, it must be shown to me by the plaintiff that no advocate and solicitors of similar standing and seniority, having considered the facts of this case, would have made the same decision.

[106] I find that the plaintiff did not prove that the defendants were negligent. I also find that the third defendant has shown to my satisfaction that based on the opinion of Mr Robert Lazar, a senior advocate and a doyen of the Malaysian Bar, the decision made by the defendants, especially that of the third defendant is reasonable in the circumstances of this case.

[107] According to Mr Robert Lazar, it is reasonable for an advocate and solicitor, especially when dealing with an appeal from a decision of the court of first instance, to decide on the merits of the arguments and concentrate solely on issues of law instead of facts. As I have intimated earlier, issues of facts as found by the lower courts are generally not interfered with by the appellate courts. I agree that counsel usually faces an uphill task in persuading the Court of Appeal to reverse such decisions.

[108] I also find that the opinion of Mr Robert Lazar as found in his affidavit affirmed on 21 March 2019 is correct and as seen in his testimony before me. Counsel and solicitors are not mere mouthpieces of their clients, and they have a duty not only to their clients but also to the court. Counsel and solicitors are required to exercise professional and independent judgment in determining the arguments and issues to be put to the Court of Appeal.

[109] I agree that care must be taken when counsel or solicitors undertake cases on behalf of their clients. However, it is their role to choose which arguments ought to be put forward to the bench. Counsel and advocates must be empowered with the discretion to pick the best arguments possible to enhance the chances of success for their clients. They are not required, unless specifically instructed to do so, to put forward all of the arguments that the client wishes. This discretion is not absolute but unless it is shown that the decision is not one that a reasonable advocate would have undertaken, then he is not negligent. I do not find that the defendants were negligent as suggested by the plaintiff.

[110] The evidence of such experts assists this court in determining the standard to be expected of such professionals. The views of such professionals are however not binding but will be of great assistance in ascertaining the standards to be expected within the profession at issue. I refer to *Ngan Siong Hing v. RHB Bank Bhd* [2014] 3 CLJ 984; [2014] 2 MLJ 449; *Shearn Delamore & Co v. Sadacharamani Govindasamy* [2017] 2 CLJ 665; [2017] 1 MLJ 486 and *Tetuan Theselim Mohd Sahal & Co & Ors v. Tan Boon Huat & Anor* [2017] 6 CLJ 368; [2017] 4 MLJ 207.

[111] In addition to the above, I also find that merely because a counsel or a solicitor chose not to argue issues or points that the client or even another attorney believes to be strong does not mean that the said counsel is negligent. It is worth repeating the judgment of Lord Wilberforce:

> *No matter what profession it may be, the common law does not impose on those who practise it any liability for damage resulting from what in the result turn out to have been errors of judgment, unless the error was such as no reasonably well-informed and competent member of that profession could have made. So too the common law makes allowance for the difficulties in the circumstances in which professional judgments have to be made and acted upon.* (emphasis added)

[112] I also refer to the judgment of Sir Murray Stuart-Smith in *VG v. Denise Kingsmill* [2001] EWCA Civ 934:

> The circumstances in which barristers and solicitors have to exercise their judgment vary enormously. On the one hand decisions have frequently to be made in court with little time for mature consideration or discussion. That is a situation familiar to any advocate. It is one in which it may be very difficult to categorise the advocate's decision as negligent even if later events proved it to be wrong. Or in a very complex case it may be that in advising settlement too much weight is given to some factors and not enough to others. *Here again a difficult judgment has to be made; and unless the advice was blatantly wrong, ie, such as no competent and experienced practitioner would give it, it cannot be impugned and the prospects of successfully doing so would seem very slight.* (emphasis added)

[113] I further refer to the decision of Lord Carswell in *May v. Pettman Smith (A Firm)* [2005] 1 WLR 581:

> *... it would not be in the interests of these [advocates] if they were compelled by the effect of over-prescriptive decisions to adopt a practice of defensive advocacy in the conduct of litigation or advising litigants about the course to be taken ... it would be unfortunate if they felt they had to hedge their opinions about with qualifications. It would be equally unfortunate if another effect of the same syndrome were to be an abdication of responsibility for decisions relating to the conduct of litigation and a reluctance to give clients the advice which they require in their own best interests.* (emphasis added)

[114] It is also instructive that I refer to the judgment of the House of Lords in *Arthur JS Hall And Co v. Simons And Barratt* [2000] UKHL 38, where the previous rule of absolute immunity of barristers was abolished in England and Wales.

[115] One of the issues that were considered by the House of Lords in determining whether the abolishing of such immunity will open the floodgates to claims against barristers and dilute the quality of advocacy before the courts. Lord Steyn opined that there was no such danger:

> There is no reason to fear a flood of negligence suits against barristers. *The mere doing of his duty to the court by the advocate to the detriment of his client could never be called negligent. Indeed if the advocate's conduct was bona fide dictated by his perception of his duty to the court there would be no possibility of the court holding him to be negligent. Moreover, when such claims are made courts will take into account the difficult decisions faced daily by barristers working in demanding situations to tight timetables.* In this context the observations of Sir Thomas Bingham MR (now Lord Bingham of Cornhill) in *Ridehalgh v. Horsefield* [1994] Ch 205 are instructive. Dealing with the circumstances in which a wasted costs order against a barrister might be appropriate he observed, at p. 236:
>
> > Any judge who is invited to make or contemplates *making an order arising out of an advocate's conduct of court proceedings must make full allowance for the fact that an advocate in court, like a commander in battle, often has to make decisions quickly and under pressure, in the fog of war and ignorant of developments on the other side of the hill. Mistakes will inevitably be made, things done which the outcome shows to have been unwise*. But advocacy is more an art than a science. It cannot be conducted according to formulae. Individuals differ in their style and approach. It is only when, with all allowances made, an advocate's conduct of court proceedings is quite plainly unjustifiable that it can be appropriate to make a wasted costs order against him.
>
> *For broadly similar reasons it will not be easy to establish negligence against a barrister. The courts can be trusted to differentiate between errors of judgment and true negligence. In any event, a plaintiff who claims that poor advocacy resulted in an unfavourable outcome will face the very great obstacle of showing that a better standard of advocacy would have resulted in a more favourable outcome. Unmeritorious claims against barristers will be struck out.* (emphasis added)

[116] Based on the above authorities, the opinion of the expert concerning the practice of the Malaysian Bar and the facts alluded to above, I find that the defendants were not negligent merely because they choose to adopt the sole single point for the civil appeal.

[117] The third defendant, being counsel appointed, must consider all available arguments and consider what would be the best arguments that he should put forward at the civil appeal. As I said earlier, this practice is also intimated by Mr Robert Lazar who says that counsel is always given the liberty and leeway to consider all possible arguments and argue what he believes may be the best argument available to his client. The same opinion may not be shared by another advocate of similar standing, but this does not

mean that he is negligent. I do not find that the decision made by the third defendant is so wrong that no advocate of similar standing would have not made the same decision.

[118] I have also considered the plausibility and the reasoning put forward by the defendants. The third defendant explained that he chose the *locus standi* point as that would have solely been an issue of law. At the time when the appeal was heard, he suggests that the law concerning *locus standi* was still in a state of flux as seen in *Au Meng Nam & Anor v. Ung Yak Chew & Ors* [2007] 4 CLJ 526. This issue of law was only recently resolved in *T Sivam Tharamalingam v. Public Bank Bhd* [2018] 6 CLJ 1 and *CIMB Bank Bhd v. AmBank (M) Bhd & Ors* [2017] 9 CLJ 145 where the category of parties protected under s. 340 of the National Land Code and those afforded the opportunity to challenge the title or interest held by any such person also includes charges or any interest recognised under the National Land Code.

[119] Therefore, at the time when the civil appeal was being considered this is a plausible argument to be put forward. I also agree with the opinion of the defendants that issues of facts are rarely overturned by the Court of Appeal. The danger of convoluting the issues and rendering the Court of Appeal impervious to the legal arguments is also a plausible danger that they had to take into consideration. The decision not to pursue such arguments is not on its own negligent.

[120] Obviously, with 2020 hindsight, one could easily criticise the position adopted by the defendants, but I do not believe they were negligent in the approach adopted in the conduct of the civil appeal. I find that the defendants had taken all necessary due care to ensure that the best arguments, they think fit, were presented to the Court of Appeal. The same applies to the decision to withdraw the counterclaim.

[121] I note that one of the criticisms put to bear against the defendants is that the plaintiff contends it was obvious during the civil appeal that the *locus standi* was not the main issue in the view of the Court of Appeal Judges. The plaintiff's counsel refers to the opening remarks by the Chair of the Court of Appeal that suggests that the panel was concerned with the issue of whether the plaintiff did fall under the category of persons that ought to be protected under s. 340(3) of the National Land Code.

[122] On this issue, I also find that the defendants were not negligent. One must not forget that counsel and solicitors must make quick determinations of issues considering what judges may say on the date of the hearing. I do not find that the decision to maintain the course and not argue the other points of contentions and withdraw the counterclaim shows that the defendants were negligent. Based on the facts available to the defendants, the arguments available to them and the judgment of the court of first instance, I believe that the actions of the defendants are in line with their duties and obligations to the plaintiff. This view was also confirmed based on the

opinion of Mr Robert Lazar. As he states, this decision is reasonable and is consistent with the practice of counsel and advocates of the Malaysian Bar. In other words, it is not a decision that is so plainly or obviously wrong that no advocate would have undertaken it.

[123] I also note that the plaintiff has not afforded any opinion from any senior member of the Malaysian Bar that counters the opinion of Mr Robert Lazar. Considering the above, I accept that the opinion of Mr Robert Lazar represents the current practice of an advocate and solicitor called to the Malaysian Bar. The evidence of Mr Rajentharan (PW1) does not fall under the same category as he gave evidence solely on what transpired during the conduct of the case from its inception in the High Court to the Court of Appeal and not what is the current practice of the Malaysian Bar when dealing with such issues.

[124] Another important factor that I have taken into consideration pertains to the first and second defendants. I believe that they have engaged senior counsel based on the request of the plaintiff and sought whom they believe can present their client's case to the best of his ability. The choice of counsel was not part of the pleaded case against the first and second defendants. Therefore, the first and second defendants are entitled to rely on the views of the third defendant unless it is shown that the view was so obviously wrong that they ought to have objected. As I have stated earlier, I find that the decision not to argue all the issues raised in the memorandum of appeal and the decision to withdraw the counterclaim is not negligent.

[125] A periphery issue that was harped on by the plaintiff during the hearing of the civil appeal was the alleged failure by the defendants to at least allow his friend Mr Rajentharan to appear and argue on the points if the defendants were not willing to do so.

[126] I find that this argument is strange and is merely an afterthought to support the claim against the defendants. Rajentharan himself admits that he was not ready to argue the case on the date of the hearing despite the plaintiff's constant consternation that his friend was willing and able to do so. He admits that he was not even properly attired to appear in open court on the said date.

[127] If indeed this is true, as I have said earlier, there was every reason then for the plaintiff to immediately discharge the defendants when he found out that they were not willing to continue with the other arguments. He had an able counsel who was allegedly ready and had prepared the earlier submissions. He had been with the plaintiff from the beginning and is well aware of all nuances and issues that allegedly would have won the civil appeal. The plaintiff also alleged that he had brought with him sufficient copies of the submissions prepared by Rajentharan to be put to the Court of Appeal.

[128] Instead, the plaintiff allowed the defendants to continue with the path that they led him through. To reiterate, even Rajentharan himself said he was not ready and was not properly attired to present the case on that day.

[129] Therefore, based on the preponderance of evidence before me, I do not believe that the plaintiff's contentions are true. Neither do I accept the contentions raised in the subsequent letters issued by the plaintiff as well as the complaints raised before the Malaysian Bar Disciplinary Panel. To me, they are merely complaints by a disgruntled client who is unhappy with the outcome of a case.

Alleged Failure To Advice On The Decision Not To Continue With The Counterclaim And The Remaining Points Of Appeal

[130] On the issue of the alleged failure to advise the plaintiff, I take note that the defendants did not provide any written opinion to the plaintiff as to the consequences of the withdrawal of the counterclaim and the decision to only argue a single issue before the Court of Appeal. This may not have been the most prudent approach to take when dealing with the conduct of an appeal. However, this does not mean that they are negligent.

[131] I must however take note of the expedient speed in which the defendants had to undertake their preparation of the civil appeal and that they were not the original counsel or solicitors that had been responsible for the conduct of the defence before Vernon J.

[132] The facts indicate that the first and second defendants were appointed as solicitors to take the conduct of the matter from Messrs A I Nathan on 1 November 2012. An application to amend the memorandum of appeal was filed on the instruction of the plaintiff on 28 November 2012.

[133] The civil appeal was supposed to be heard on 23 January 2013 with the assistance of Mr R Thayalan and he was supposed to have prepared the submissions to be utilised at the Court of Appeal hearing. Submissions were prepared by Rajentharan and were emailed to the first and second defendants on 22 January 2013 for their consideration.

[134] The civil appeal was subsequently adjourned to 15 March 2013 due to the health of Mr R Thayalan. The said counsel then refused to act for the plaintiff and the first and second defendants were tasked to seek an alternative counsel.

[135] Sometime in early March or late February 2013, the first and second defendants then sought assistance from the third defendant to act as counsel for the civil appeal. The third defendant took time to consider the documents made available by the first and second defendants and agreed to act on behalf of the plaintiff. This is reasonable conduct based on the facts before me.

[136] The defendants began work by drafting the submissions to be utilised and the arguments to be put to the Court of Appeal. Due to the timeline presented to the third defendant, he only had a window of less than a month before the appeal and almost less than two weeks to prepare submissions for the hearing of the Court of Appeal.

[137] Therefore, I am of the opinion that the defendants could not be blamed for not providing any written opinion to the plaintiff as to the merits of the appeal and the counterclaim. They were constrained by time and had to act immediately to prepare for the appeal. I also find that the plaintiff was well informed of the decision to not pursue the remainder of the issues and agreed to leave it to counsel to do so. The fact that there were no written instructions agreeing to the same, does not on its own show that the defendants were negligent.

[138] I am also of the opinion that as the plaintiff did receive the submissions drafted by the third defendant and did attend a meeting with the first and second defendants to discuss the conduct of the appeal. I find that the said defendants did take all reasonable steps to ensure that the views of counsel were shared with the plaintiff. I also find that the strategy to be adopted for the appeal was also shared by the defendants with the plaintiff.

[139] Furthermore, I find that the plaintiff did speak to the third defendant personally during the short break before the Court of Appeal and explained again the proposed strategy adopted. I opine that the evidence suggests that the plaintiff did agree to the said proposition.

[140] My views are fortified by the evidence of the assistant of the third defendant who also attended the short meeting during the break suggested by the Court of Appeal. He confirmed that the third defendant did explain the strategy that was being adopted and that the plaintiff nodded and did not complain. That suggests to me that he understood the reasons for the said decision and agreed to the approach taken by counsel.

[141] This also appears in the letter dated 22 March 2013 issued by the plaintiff to the third defendant where he states:

> I am wondering as to why Mr Selvaraja was not comfortable with it all by saying that their Lordships and Ladyship will get annoyed if we raise many issues and do not have the patience to listen and that he's aware of their mindset and so on. I had asked both you and Mr Selvaraja during the 30 minutes break to include my friend Raj also a practising lawyer and a Member of the Bar to be introduced as a co-counsel to address and ventilate all my 46 points ... You and Mr Selva did n ot agree to my request ...

This also appears in his written complaint to the Advocates and Solicitors Disciplinary Board dated 3 September 2013.

[142] If his version is to be believed, then surely, the plaintiff would have discharged the defendants and ensured that Mr Rajentharan, his close friend, and able counsel, who is ever ready to argue the case, sprung to save his cause. Instead, as Rajentharan admits, he did not argue as he was not ready, not properly attired and chose to remain quiet throughout the civil appeal.

[143] To me, this proves that the version of events as suggested by the defendants is true. I find that the plaintiff's contentions are not supported by the facts and the evidence before me. I prefer the evidence presented by the defendants' witnesses to that of those presented by the plaintiff and Rajentharan.

Alleged Failure To Seek Surplus Proceeds From The Sale Of The Land

[144] I find that this issue is a non-starter. The plaintiff has not produced any evidence to show that there are any surplus proceeds from the sale of the property by CIMB Bank Bhd.

[145] Secondly, as the title of the plaintiff to the property is not defeasible, he has no interest in the said land and any surplus would be paid to the original owner of the land and not him.

[146] I, therefore, do not find the defendants were guilty of negligence on this issue as suggested by the plaintiff.

The Plaintiff Has Not Suffered Any Damages Even If The Defendants Were Negligent

[147] Even if I am wrong on the above, I find that the plaintiff has failed to prove that the actions of the defendants have caused any form of damages to him.

[148] To be successful in a claim for negligence, the plaintiff must still prove that the damages he claims are caused by the alleged defendants' breach of their duties of care to him.

[149] In a case concerning the loss of chance, such as ours, the plaintiff must prove that he has lost "something of value and show to this court what would have been his prospects of success had the civil appeal been fought out as allegedly instructed".

[150] I refer to the judgment of Vazeer Alam Mydin Meera JC (as he then was) in *Tenaga Nasional Bhd v. Tetuan Ariff & Co* [2014] 1 CLJ 1112, where His Lordship stated:

> [18] It is settled that in a claim of this nature, in assessing damages arising from professional negligence of solicitors, the question is not whether the plaintiff would have succeeded in its claim against EPE; *but rather whether the defendant's negligence has occasioned the plaintiff to lose a valuable right, cause of action, chance or opportunity to claim their loss*. In *Lim Soh Wah & Anor v. Wong Sin Chong & Anor & Another Appeal* [2001] 2 CLJ 344; [2001] 2 AMR 2001, in a claim for damages against a firm of solicitors for negligence, the

Court of Appeal held that negligence of the appellant solicitor by reason of non-attendance in court occasioned by the appellant's failure to diarise the respondents' case meant that the respondent in that case had lost a valuable right, which is the opportunity to convince the judge of first instance by way of oral testimony and documentary evidence, that they had a complete answer to the claim that had been brought against them. (See also the cases of *Tatab Industries Sdn Bhd (In Receivership) v. Su Thiam Hock @ Su Then Hack* [1994] 1 CLJ 544; *Kitchen v. Royal Air Forces Association and Others* [1958] All ER 241; and *Allen v. Sir Alfred McAlpine & Sons Ltd And Other Appeals* [1968] 1 All ER 543 – where similar questions were asked in determining the causal link between the act of negligence and issue of damages). *It is the loss of chance of recovery of damages in the dismissed action that determines the issue of damages and not the prospect of success in that dismissed action*. In fact in the case of *Sykt Siaw Teck Hwa Realty & Developments Sdn Bhd v. Malek & Joseph Au* [1999] 3 CLJ 184; [1999] 5 MLJ 588 the court held that *it was indeed mischievous and unethical of the solicitor to justify his breach of duty of care by raising the question of the merit of the client's appeal and its lack of prospect of success in order to defeat the client's claim for damages in an action for negligence*. In *Allen v. Sir Alfred McAlpine & Sons Ltd And Other Appeals* [1968] 1 All ER 543 Lord Denning MR speaking for the English Court of Appeal held that when an action is dismissed as a result of a solicitor's negligence, the client:

> ... in a subsequent action for negligence against his solicitor can recover, in addition to the costs of the action which has been dismissed, compensation for the loss of his chances of recovering damages against the defendant in the dismissed action had been properly conducted on his behalf by the solicitor.

[19] Further, in *Sharif And Others v. Garret & Co (A Firm)* [2001] 3 All ER 195, the respondent firm of solicitors were sued in negligence when its client's case was struck out for want of prosecution. The Court of Appeal of England and Wales, laid down a two-tier approach to the assessment of damages. Simon Brown LJ speaking for the Court of Appeal held as follows:

> *In stating the principles generally applicable to this class of case, I indicated in Mount v. Barker Austin (A Firm) [1998] PNLR 493 at 510, 511 a two-stage approach. First, the court has to decide whether the claimant has lost something of value or whether on the contrary his prospects of success in the original action were negligible. Secondly, assuming the claimant surmounts this initial handle, the court must then 'make a realistic assessment of what would have been the plaintiff's prospects of success had the original litigation been fought out'.*

With regard to the first stage, the evidential burden rests on the negligent solicitors: they, after all, in the great majority of these cases will have been charging the claimant for their services and failing to advise him that in reality his claim was worthless so that he would be better off simply discontinuing it. The claimant, therefore, should be given the benefit of any doubts as to whether or not his original claim was doomed to inevitable failure. With regard to the second stage, the *Armory v. Delamirie*

A [1722] 1 Stra 505, [1558-1774] All ER Rep 121 principle comes into play in the sense that the court will tend to assess the claimant's prospects generously given that it was the defendant's negligence which has lost him the chance of succeeding in full or fuller measure.

[20] I find that the approach taken by the Court of Appeal of England and
B Wales in *Sharif And Others v. Garret & Co (A Firm)* (*supra*) in assessing damages in a claim for solicitor's professional negligence is both practical and useful. In fact the initial determination of the question of whether the claimant has lost something of value as a result of his solicitor's breach of duty has been applied by our Court of Appeal in *Lim Soh Wah & Anor v. Wong Sin Chong & Anor (And Another Appeal)* [2001] 2 CLJ 344; [2001]
C 2 AMR 2001. (emphasis added)

[151] I am aware that in such action, the court will likely side with the plaintiff as it is mischievous and wrong for a solicitor to raise the issue of the merit of the client's case to defeat the claim. However, I am of the view that the facts of this case suggest otherwise. This is not a claim based on a
D failure to attend court to file a claim within a strict limitation time frame or failure to file a notice of appeal within time.

[152] This is a case that relies on the alleged failure of counsel to argue a point of law or issue of facts at an appeal where the court of first instance has decided against him. The mountain that the plaintiff or his counsel must
E climb to persuade the Court of Appeal that the trial judge had committed errors is not one that could be easily passed.

[153] I opine that it is for the plaintiff to show to this court that if the said arguments were fully ventilated at the Court of Appeal he would have won
F and obtained his land back.

[154] I again refer to the decision of the UK Supreme Court in *Perry v. Raleys Solicitors* [2019] UKSC 5. In that case, Lord Briggs delivering the judgment of the UK Supreme Court held:

19. *But none of this means that the common law has simply abandoned the basic*
G *requirement that a claim in negligence requires proof that loss has been caused by the breach of duty, still less erected as a self-standing principle that it is always wrong in a professional negligence claim to investigate, with all the adversarial rigour of a trial, facts relevant to the claim that the client has been caused loss by the breach, which it is fair that the client should have to prove.*

H 20. For present purposes the courts have developed a clear and common-sense dividing line between those matters which the client must prove, and those which may better be assessed upon the basis of the evaluation of a lost chance. *To the extent (if at all) that the question whether the client would have been better off depends upon what the client would have done upon receipt of competent advice, this must be proved by the claimant upon the balance of*
I *probabilities. To the extent that the supposed beneficial outcome depends upon what others would have done, this depends upon a loss of chance evaluation.*

21. This sensible, fair and practicable dividing line was laid down by the Court of Appeal in *Allied Maples Group Ltd v. Simmons & Simmons (a firm)* [1995] 1 WLR 1602, ... *The Court of Appeal held that Allied Maples had to prove point (a) on a balance of probabilities, but that point (b) should be assessed upon the basis of loss of the chance that Gillow would have responded favourably. The Court of Appeal (Stuart-Smith, Hobhouse and Millett LJJ) were unanimous in that statement of legal principle, although they differed as to the outcome of its application to the facts. It was later approved by the House of Lords in Gregg v. Scott, at para 11 by Lord Nicholls and para 83 by Lord Hoffmann*.

...

23. Two important consequences flow from the application of this balance of probabilities test to the question what the client would have done, in receipt of competent advice. The first is that it gives rise to an all or nothing outcome, in the usual way. If he proves upon the narrowest balance that he would have brought the relevant claim within time, the client suffers no discount in the value of the claim by reason of the substantial possibility that he might not have done so: see Stuart Smith LJ in the *Allied Maples* case at [1995] 1 WLR 1602, 1610G-H. By the same token, if he fails, however narrowly, to prove that he would have taken the requisite initiating action, the client gets nothing on account of the less than 50% chance that he might have done so.

24. *The second consequence flows directly from the first. Since success or failure in proving on the balance of probabilities that he would have taken the necessary initiating step is of such fundamental importance to the client's claim against his advisor, there is no reason in principle or in justice why either party to the negligence proceedings should be deprived of the full benefit of an adversarial trial of that issue. If it can be fairly tried (which this principle assumes) then it must be properly tried*. And if (as in this case) the answer to the question whether the client would, properly advised, have taken the requisite initiating step may be illuminated by reference to facts which, if disputed, would have fallen to be investigated in the underlying claim, this cannot of itself be a good reason not to subject them to the forensic rigour of a trial. As will appear, this has an important bearing on the extent of the general rule that, for the purpose of evaluating the loss of a chance, the court does not undertake a trial within a trial. (emphasis added)

[155] This is also seen in the assessment of the case by Saffman J that had heard the case at trial. In his judgment he laid down the issues that must be answered by the claimant as follows:

In short therefore the issues for determination are;

(a) whether the claim is statute barred,

(b) if not, whether the admitted breach of duty caused or materially contributed to the claimant's alleged loss. In the context of this case did the breach cause the claimant to settle his claim at an undervalue because, on balance, if properly advised, and on the assumption that he acted honestly, he would have made a claim for a Services Award? ...

A (c) **has the claimant lost something of value in the sense that his prospects of success in a claim for a Services Award were more than negligible?**

(d) if the claimant has lost a claim with more than a negligible prospect of success what is a realistic assessment of what the
B **prospects of success were?**

(e) what is an appropriate assessment of the likely value of the claim having taken account of the prospects of success?

...

C The onus is on the claimant to establish causation on the balance of probabilities. The claimant therefore must establish on balance that he would have acted differently if properly advised and a lack of opportunity to do so has caused him loss. In other words the claimant must establish that the breach of duty actually caused him loss. (emphasis added)

D **[156]** I am aware that it is not the function of this court to act as an appellate court against the decision of Vernon J, who now sits as a Federal Court Judge. Nevertheless, I opine that it is incumbent on the plaintiff to still prove on a balance of probabilities what are the chances of success that the appeal on the arguments that were missed out by the defendants and the continuation
E of the appeal on the counterclaim would be successful. This was simply not done. The plaintiff merely glossed over this issue in his evidence, and this is not even helped by the inconsistent testimony of Rajentharan.

[157] I opine that the plaintiff has failed to discharge the burden of proving the chances of success of the civil appeal. He has not shown to me the errors
F of law and facts that were committed by Vernon J and whether there is any real possibility that the Court of Appeal will overturn those findings of fact against him. The evidence before me and even the draft submissions that the plaintiff relies on are not convincing. I find that based on the evidence before me that even if the draft submissions had been filed, full arguments ventilated
G as suggested by the plaintiff and the counterclaim is not withdrawn, the appeal would have failed. I opine that the long-winded and unclear submissions would have most likely attracted substantial criticism from the Court of Appeal.

[158] There is another factor that I have also considered that I believe shows
H that the civil appeal is most likely will fail. Even the plaintiff's own friend, who, as I have repeated many times, was involved in the case from the start, did not choose to stand up at the hearing and attempt to even canvass the civil appeal on the points. I appreciate that the plaintiff contends that the third defendant refused him the opportunity to do so. However, this contention
I runs counter to what the Rajentharan himself says. He was not properly attired and was not ready to argue. Indicating to me that he himself was not confident of the chances of success but did not want to clearly state this to his friend.

[159] I also refer to *Kitchen v. Royal Air Force Association* [1958] 1 WLR 56; *Mount v. Baker Austin (a firm)* [1998] PNLR 493; *Shariff And Other v. Garrett & Co (A Firm)* [2002] 3 All ER 195; and *Pang Yeow Chow v. Advance Specialist Treatment Engineering Sdn Bhd* [2014] 8 CLJ 188; [2015] 1 MLJ 490. It must be shown to me by the plaintiff that the "loss of chance must be real and substantial rather than merely negligible".

[160] To quote Shakespeare, "It's not enough to speak, but to speak true". Despite whatever the third defendant says, the plaintiff could have insisted and could have pushed his friend forward to put these arguments to the Court of Appeal. This was not done, and I find that this proves that the chances of success were insignificant that even Rajentharan was not willing to step up to the plate and bat for his friend.

[161] Based on the above, I opine that it is for the plaintiff to prove that he would have been successful if all the points were raised at the Court of Appeal and the counterclaim was not withdrawn.

Alleged Breach Of Contract Against The Defendants

[162] I also find based on the above reasons that the plaintiff has failed to prove that the defendants have breached their contractual obligations to the plaintiff.

[163] I find that the defendants did act in accordance with their duties to the plaintiff and acted in the best interest of their client.

Orders Of This Court

[164] Based on the above, I dismiss the plaintiff's claim with costs of RM50,000 subject to allocator to be paid by the plaintiff to each of the defendant's solicitors. On the issue of costs, I have taken into account the seniority of counsel, complexity of the matter, the importance of the subject matter to the parties and the manner in which the claim was brought against the defendants.